(6)

No. 96-1395

In The
Supreme Court of the United States
October Term 1996

JAMES B. KING, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,

VS.

LESTER E. ERICKSON, JR., ET. AL.
Respondents.

JAMES B. KING, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,

VS.

HARRY R. MCMANUS, ET. AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MOTION TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. IN SUPPORT OF THE PETITIONER.

(List of Counsel on Inside Front Cover)

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This brief is filed pursuant to the Rules of the United States Supreme Court. Consent to file has been granted by Counsel for the Petitioner. Consent has also been received from Paul E. Marth, Counsel for Lester E. Erickson, Jr. Those

letters have been filed with the Clerk of this Court. As of the filing of this brief, consents have not been received from the other Respondents in this case. If they are subsequently received, the Clerk of this Court will be notified, the letters will be filed, and the motion will be withdrawn.[1]

The International Association of Chiefs of Police, Inc. moves this Court for leave to file the attached brief as *amicus curiae*, and declares as follows:

1. *Identity and Interest of Amicus Curiae.* The *amicus curiae* is described as follows:

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

2. *Desirability of an Amicus Curiae Brief. Amicus* is a professional association representing the interests of state and local law enforcement agencies at the national and international levels.

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[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: This brief was authored for the *amicus* by Jody M. Litchford, Esq., counsel of record; Elliot B. Spector, Esq.; James P. Manak, Esq. (also the motion); and Wayne W. Schmidt, Esq., Chair, Subcommittee on Internal Affairs, International Association of Chiefs of Police, Inc. No other persons authored this motion or brief. The International Association of Chiefs of Police, Inc., and Americans for Effective Law Enforcement, Inc., made the complete monetary contribution to the preparation and submission of this motion and brief, without financial support from any other source, directly or indirectly.

Because of the relationship with our members, and the composition of our membership and directors, including active law enforcement administrators and counsel at the national level, we are particularly aware of the impact of the ruling of the court below on the management and administration of law enforcement agencies at all levels of government as it relates to the discipline of personnel and the integrity of the law enforcement function. Without the ability of law enforcement management to effectively discipline personnel, the law enforcement function in this country will be seriously impaired. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing That Existing Briefs May Not Present All Issues.* IACP is an international and national association, and its perspective is broad. Although the parties clearly are represented by capable and diligent counsel, no single party can completely develop all relevant views of such policy issues.

4. *Avoidance of Duplication.* Counsel for *amicus curiae* has reviewed the facts of this case and has conferred with Counsel for the Petitioner in an effort to avoid unnecessary duplication. It is believed that this brief presents vital policy issues directly related to law enforcement management and administration that are not otherwise raised by the parties.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of the parties. The consent of Petitioner has been received. Consent has also been received from Paul E. Marth, Counsel for Lester E. Erickson, Jr. Those letters have been filed with the Clerk of this Court. As of the filing of this brief, consents have not been received from the other Respondents in this case.

For these reasons, the *amicus curiae* requests that it be granted leave to file the attached *amicus curiae* brief.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

See Section on Identity and Interest of *Amicus Curiae*, *supra*.

STATEMENT OF THE CASE

The court below, *King v. Erickson, Jr., Et. Al.*, 89 F.3d 1575 (Fed. Cir. 1996), ruled that a federal government agency could not, consistently with the Fifth Amendment's Due Process Clause, charge an employee both with an employment-related misconduct charge and with making a false statement concerning the alleged misconduct based on the employee's denial of the charge or the facts underlying the charge.

SUMMARY OF ARGUMENT

Amicus contends that the issue before this Court is the existence of a constitutionally-protected "right to lie" by police officers and other public employees when questioned by their employer about circumstances related to their jobs. The Federal

Circuit Court of Appeals, relying on previous federal circuit precedent in *Grubka v. Department of Treasury*, 858 F.2d 1570 (Fed. Cir. 1988), held that the "right to lie" in such circumstances, is guaranteed by the due process clause of the Fifth Amendment. The International Association of Chiefs of Police urges this Court to strongly reject the rationale as well as the result reached by the Federal Circuit in the instant cases.

ARGUMENT

THE DUE PROCESS GUARANTEES OF THE UNITED STATES CONSTITUTION DO NOT PROVIDE GOVERNMENTAL EMPLOYEES WITH A PROTECTED RIGHT TO LIE WHEN REQUIRED TO RESPOND TO QUESTIONS NARROWLY AND DIRECTLY RELATED TO THEIR EMPLOYMENT.

Although the cases below were decided on the basis of the Fifth Amendment Due Process Clause, the decision of the court below, if sustained, will, through application of the Fourteenth Amendment, have far reaching impact on state and local police agencies, which commonly require truthfulness of law enforcement officers during internal affairs investigations as well as at other times. Had this case been decided on grounds unique to the federal merit service system, the decision would be merely unfortunate. *See, e.g., ABF Freight Systems v. National Labor Relations Board*, 510 U.S. 317 (1994). As decided on the basis of a constitutional guarantee of due process, however, it has the potential to wreak havoc on state and local criminal justice systems across the nation and, therefore, must be reversed.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), this Court recognized that the Constitution provides employees of the federal, state, and local government, who have a property interest in their jobs, with minimum due process requirements when those rights are infringed. The

Court identified the extent of the due process required by the Constitution in such cases, holding that prior to the implementation of the disciplinary action, due process requires only notice and an opportunity to be heard. The opportunity to be heard in this context was further described as simply an opportunity for the employee to present his side of the story. The Court recognized the limited nature of these rights but posited that "[t]o require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Loudermill*, 470 U.S. at 546.

Notwithstanding this restriction, the Federal Circuit in the instant cases extended the protections of the due process clause not only to the employer's investigatory interview practices but also to protect employees from subsequent adverse use of untruthful statements made to the employer during the administrative process. In broadening due process requirements in this unprecedented fashion, the Federal Circuit Court far exceeded the parameters established in *Loudermill*, and espoused a principle that will, indeed, intrude to an unwarranted extent on the government's responsibility to take appropriate action to investigate and deter employee misconduct.

The notion that the right to testify includes the right to testify untruthfully has been repeatedly rejected by this Court in criminal law cases. *United States v. Dunnigan*, 507 U.S. 87 (1993); *United States v. Havens*, 446 U.S. 620 (1980); *Harris v. New York*, 401 U.S. 222 (1971). The *Dunnigan* case, although arising in a criminal context, encompassed facts directly analogous to the cases under review. In *Dunnigan*, the defendant testified on her own behalf at trial, denying her participation in the alleged criminal conduct. The district court found this testimony to be untruthful and, following conviction, enhanced her sentence for the underlying criminal conduct on the basis of this perjury. This Court upheld the actions of the district court, reiterating that "a defendant's right to testify does not include a right to commit perjury." *Dunnigan*, 507 U.S. at

96. Similar to *Dunnigan*, the government employer in the instant cases additionally penalize employees for untruthfulness during the administrative investigation into their misconduct. Based on *Dunnigan*, this power cannot be held unconstitutional, and the Federal Circuit's holding to the contrary is erroneous. If due process does not encompass a right to testify untruthfully in a criminal case, then it certainly does not encompass such a right in an administrative hearing where constitutional safeguards are not as stringent.

The level of process due in any given situation is, inter alia, a function of the significance of the private interest affected by the action. *Gilbert v. Homer*, 117 S. Ct. 1807 (1997); *Mathews v. Eldridge*, 424 U.S. 319 (1976). At stake in the cases this Court has decided in the criminal context is obviously the liberty of the accused. Although this Court has consistently held that some type of process is required when a property, rather than a liberty, interest is involved, the requirement of due process in the property rights context is generally less rigorous. The interests in continued governmental employment at stake in the instant case, while not insignificant, do not approach the significance of the denial of liberty at issue in the *Harris*, *Havens*, and *Dunnigan* cases. If there is no due process right to testify untruthfully in those cases, as this Court has held, then there can be no due process right to untruthfulness in employment cases where lesser interests are at stake.

Moreover, the decisions by the Federal Circuit in these cases is in direct conflict with the earlier decisions of this Court in *Gardner v. Broderick*, 392 U.S. 273 (1968) and *Sanitation Men v. Sanitation Commissioner*, 392 U.S. 280 (1968). In these cases, this Court clearly held that public employees can be required, on pain of dismissal, to answer questions "specifically, directly, and narrowly relating to the performance of their official duties" so long as in so doing they are not required to waive their Fifth Amendment privilege against self-incrimination. *Sanitation Men*, 392 U.S. at 284. In reaching this result, the Court distinguished public employees from

others whose forced choice in this regard might raise different constitutional implications. The Court noted that a public employee is "directly, immediately, and entirely responsible to the City or State which is his employer. He owes his entire loyalty to it. . . . He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer." *Gardner*, 392 U.S. at 278. The court further noted that "the policeman is either responsible to the State or to no one." *Id.* at 279. Herein lies the danger inherent in the decisions of the Federal Circuit. Police officers are entrusted by the government and ultimately by society at large with unparalleled power and authority. They are vested with the ability to bear arms and to deprive citizens of their liberty, their property and, under some circumstances, even their lives. Because of the exigencies inherent in their jobs, these powers often must be exercised under circumstances of great independence and little prior process or review. Certainly with respect to the employees occupying such positions of authority, the governmental employer must have the right to demand and enforce rules providing that only persons of the utmost integrity are so empowered.

Both the governmental employer and the greater citizenry have the right to establish and enforce rules related to the integrity of their law enforcement forces. To that end, police agencies commonly have rules requiring their personnel to truthfully answer questions that are narrowly and directly related to their job responsibilities. These rules generally apply whether the questions are asked by a supervisor in connection with a police operation or by a manager or internal affairs investigator inquiring into allegations of misconduct. To deny police agencies the ability to effectively investigate issues related to police misconduct unduly interferes with the effective and efficient operation of the department. More fundamental, by interfering with the department's ability to enforce and maintain the integrity of its operations and employees, this crippling erosion of internal investigating power will ultimately work to the detriment of all society.

In a large percentage, if not the majority, of police misconduct cases, investigators do not have sufficient objective evidence to sustain complaints. More often than not, it is the complainant's rendition versus the officer's. Without the ability to demand honest statements from officers, many complaints will remain unresolved. Today many officers will admit their misconduct because of their willingness to take responsibility for their actions, or because they know the disciplinary sanctions for untruthfulness will often be more severe than the sanctions for the underlying misconduct. Similarly, officers observing or having knowledge of fellow officers' misconduct will also truthfully respond to investigators' inquiries.

If the instant cases are upheld, peer pressure will ensure that participating and observing officers who may be subjected to discipline will deny involvement or knowledge of the underlying facts of the alleged misconduct. The law will breathe new life into and further validate the "Code of Silence" described in *Brandon v. Holt*, 469 U.S. 464, 467 (1995). This invigorated Code of Silence inevitably will lead to a reduction in the filing of complaints and cover-ups, and supervisors may be insulated from knowledge of wrongdoing by officers. As a result, police administrators will be restricted in their ability to discover misconduct.

It is not unreasonable to expect an officer to take responsibility for misconduct in the interest of protecting the public and maintaining the integrity of law enforcement. On the other hand, to allow an officer to lie during a misconduct investigation bears the potential for future constitutional violations. A municipal policy that permits officers to lie to avoid discipline, thereby preventing administrators from effectively investigating and correcting misconduct, can constitute deliberate indifference triggering municipal liability.

If police misconduct is not effectively monitored and controlled, the risk of constitutional violations increases. In balancing the interests implicated, it is clear that an officer's

right to avoid responsibility for misconduct by lying is far outweighed by government's obligation to protect the public from the potential harm of undeterred police misconduct.

Faith in the criminal justice system and all its elements is the keystone in the maintenance of an ordered society. If police officers cannot be trusted to tell the truth, then a fundamental underpinning of our system of justice is destroyed. If we accept that police officers will lie when confronted with difficult choices, then we are accepting a level of dishonesty that will ultimately destroy the effectiveness of law enforcement in all regards. Logically, an officer who will compromise the truth when answering questions related to his conduct is likely to compromise the truth in other circumstances. Even if we assume that an officer willing to lie under some circumstances can be trusted to tell the truth in court, under oath, the reality is that jurors will promptly discredit the testimony of an officer who is documented to have lied in previous administrative matters. The officer's credibility as a witness becomes completely undermined and, therefore, his effectiveness as a law enforcement officer is compromised. A law enforcement employer must, in such circumstances, be allowed to strongly discipline and ultimately discharge any employee whose credibility and integrity is destroyed by his or her untruthfulness.[2]

For these reasons, the International Association of Chiefs of Police urges this Court to clearly reject the position that there is or could be a constitutionally protected "right to lie" for police officers or, indeed, for public employees of any type.

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[2] Ultimately, also, the inability to terminate an officer who is untruthful or otherwise dishonest will lead to departmental liability in subsequent civil actions.

CONCLUSION

Amicus urges this Court to reverse the decision of the court below on the basis of the precedents of this Court and sound judicial policy.

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